No. 82-999

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

CHEMETRON CORPORATION,

*Petitioner,*

v.

BUSINESS FUNDS, INC., JOHN F. AUSTIN, JR., AND DAVID C. BINTLIFF,

*Respondents.*

## SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 14, 1983

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | ii |
| RULE 28.1 STATEMENT | 1 |
| SUPPLEMENTAL BRIEF | 1 |
| CONCLUSION | 5 |
| CERTIFICATE OF SERVICE | 7 |

PAGE

## TABLE OF AUTHORITIES


### Cases

Chemetron Corp. v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982) ..... *passim*
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) ..... 1, 2
Herman & MacLean v. Huddleston, Nos. 81-680 & 81-1076 (U.S. Jan. 24, 1983) ..... *passim*
Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir.), *modified on denial of rehearing*, 650 F.2d 815 (5th Cir. 1981), *aff'd in part & rev'd in part*, Nos. 81-680 & 81-1076 (U.S. Jan. 24, 1983) ..... *passim*
Wachovia Bank & Trust Co. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) ..... 3

### Statutes

15 U.S.C. § 77k (1976) ..... 2
15 U.S.C. § 78i (1976) ..... *passim*
15 U.S.C. § 78j(b) (1976) ..... *passim*

### Rules

Rule 10b-5, 17 C.F.R. § 240.10b-5 (1982) ..... *passim*
SUP. CT. R. 22.6 ..... 1
SUP. CT. R. 28.1 ..... 1
SUP. CT. R. 28.5 ..... 7

### Miscellaneous

ALI FEDERAL SECURITIES CODE (Supp. 1981) ..... 2

### Abbreviations

Brief ..... Br.
Opinion ..... Op.
Supplemental ..... Supp.

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Pursuant to Sup. Ct. R. 22.6, Respondents submit this supplemental brief addressed to the impact of *Herman & MacLean* v. *Huddleston*, Nos. 81-680 & 81-1076 (U.S. Jan. 24, 1983), on the present case.[1]

Chemetron urges that *Huddleston* is to be read as an abandonment of the "nullification analysis" and thus a repudiation of cases such as *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), in favor of a view that the express remedies of the federal securities laws cannot be exclusive. Petitioner's Reply &

[1] Rule 28.1 Statement. The parents, subsidiaries, and affiliates of Business Funds, Inc. are Penn Central Corporation and Marathon Manufacturing Company.

Supp. Br. at 1-2. We respectfully submit that *Huddleston* satisfies all the elements of "nullification analysis" and provides no basis for grant of certiorari in this case.

First, the Court expressly recognized the consistency of its analysis with the nullification analysis of *Ernst & Ernst. Herman & MacLean* v. *Huddleston*, Nos. 81-680 & 81-1076, slip op. at 8-9 (U.S. Jan. 24, 1983). Nothing in *Huddleston* changes the primacy of congressional intent in determining the existence — and scope — of an implied remedy.[2]

Second, the Court repeatedly emphasizes that section 10(b) requires a heavier burden than section 11. *Id.* at 6, 7 & 9. This case provides a direct contrast where it is undisputed that section 9 requires a heavier burden than section 10(b) and where Chemetron does not and cannot deny that permitting a remedy under section 10(b) would nullify "the carefully drawn procedural restrictions" on section 9. *See Ernst & Ernst*, 425 U.S. at 210-11.[3]

Third, unlike *Huddleston* in which "the two provisions involve distinct causes of action and were intended to address different types of wrongdoing," slip op. at 6, section 9 and section 10

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[2] The ALI FEDERAL SECURITIES CODE, cited in the Petition (p. 8), recognizes the nullification principle by allowing an implied action only if, *inter alia*, "the action is not inconsistent with the conditions or restrictions in any of the actions expressly created." § 1722(s) (Supp. 1981).

[3] In the case at bar, allowing an implied remedy would nullify a substantive element of the only express remedy Congress created for manipulation, i.e., the requirement that the plaintiff must have bought or sold at a price affected by the manipulation. Nothing in *Huddleston* is in any way inconsistent with the Fifth Circuit's careful analysis of the differences between § 10(b) and § 9 and its conclusion that § 9 would be nullified by an implied § 10(b) remedy here. In particular, *Huddleston* is consistent with the Fifth Circuit's demonstration that the scienter burden of § 9 is greater than that of § 10(b) and is supplemented by an intent-to-induce requirement. This makes clear that the § 10(b) plaintiff has lighter burdens than a § 9 plaintiff, and hence cannot prevail without nullifying § 9. Petitioner is simply not a member of the class Congress chose to protect against manipulation; that class is limited by § 9 — quite logically — to persons who traded at prices affected by the manipulation.

address the same types of wrongdoing, as the Fifth Circuit demonstrated. *See* Respondents' Br. at 3-4.

Fourth, contrary to Chemetron's suggestion, the Court's rejection in the context of *Huddleston* of the maxim *expressio unius est exclusio alterius* is irrelevant to a decision in the present case. Petitioner's Reply & Supp. Br. at 2 & nn.2-3. The Fifth Circuit did not employ this rule of construction in either *Huddleston* or *Chemetron*. Its application would have resulted in a contrary decision by the Fifth Circuit in *Huddleston*[4] and a direct repudiation of the *Huddleston*[5] and *Chemetron*[6] analyses. Both *Huddleston*[7] and *Chemetron*[8] relied on *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). In *National Student Marketing*, the District of Columbia Circuit expressly rejected the maxim *expressio unius est exclusio alterius* calling it "a dangerous road map." *Id.* at 354-55. Instead, the court recognized the very test Chemetron erroneously suggests is based on the maxim:

> It is true that the Supreme Court has expressed concern about implying private rights of action when express remedies have been created by statute, but that concern has been limited to cases in which the express remedies would be nullified if additional remedies were implied.

*Id.* at 355.

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[4] *Expressio unius* would bar any implied remedy when an express remedy applies. Nullification bars an implied remedy only when it would undermine an express remedy by providing an easier cause of action for the same conduct.

[5] *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 540-43 (5th Cir.), *modified on denial of rehearing*, 650 F.2d 815 (5th Cir. 1981), *aff'd in part & rev'd in part*, Nos. 81-680 & 81-1076 (U.S. Jan. 24, 1983).

[6] *Chemetron Corp.* v. *Business Funds, Inc.*, 682 F.2d 1149, 1155-70 (5th Cir. 1982), A1, A7-A36.

[7] 640 F.2d at 542.

[8] 682 F.2d at 1159, A14.

Fifth, Chemetron's continued reference to cases involving the availability of dual criminal prosecutions and dual SEC enforcement proceedings is without relevance. Petitioner's Reply & Supp. Br. at 3-4. Dual criminal proceedings and dual Commission enforcement proceedings are based on express statutory authority.Those cases gave full effect to the statutory enforcement schemes that had been enacted by Congress. Neither in those cases nor in *Huddleston* did the Court face the question whether a private civil remedy should be judicially created when its creation would nullify the restrictions placed on an express congressionally-created remedy.

In sum, Congress has provided an express and carefully defined remedy under section 9 for every purchaser affected by manipulation. The failure of Chemetron to satisfy the congressionally-defined burden of proof provides no basis in law or policy for nullification of congressional standards by implication of a less rigorous judicially-created remedy.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Pursuant to SUP. CT. R. 28.5, I have served all parties required to be served with three copies of the foregoing Supplemental Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by placing the same in the United States mail, with first class postage prepaid and addressed to the following:

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